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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS MANUEL, Defendant and Appellant.	F042927 (Super. Ct. No. 02-91242) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Jr., Judge.

Sandra Uribe, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Travis Manuel appeals from a conviction of mayhem. He argues that the trial court erred in failing to give, sua sponte, a jury instruction on battery with

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section II.

serious bodily injury as a lesser-included offense of mayhem and aggravated mayhem. He also
contends that the trial court abused its discretion in sentencing him to the upper term of imprisonment.

In the published portion of this opinion, we hold that battery with serious bodily injury is a lesser-included offense of mayhem and aggravated mayhem, but the evidence nevertheless did not warrant the instruction. In the unpublished portion, we hold that the court did not err in sentencing. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

While living at the home of his father, Rudy Manuel, defendant became embroiled in an argument with his father and his father's girlfriend, the victim Sundra Ironshield. The argument concerned defendant's girlfriend, of whom Rudy and Ironshield disapproved. During the argument, Rudy asserted that defendant was acting crazy. Defendant said, "I'll show you crazy," went to his bedroom, and returned with two weapons described as samurai swords. Defendant brandished one sword. Ironshield grabbed the blade and made defiant statements.

A melee ensued in which Ironshield sustained severe injuries. She was taken to a hospital where emergency surgery was performed to repair lacerations to her right hand, left arm, forehead, cheek, and chest. The main artery in her left arm was severed and its repair required a graft of tissue from her leg. The muscles of the left arm were also severed. The tendons of the pinky and ring finger of her right hand were severed and had to be surgically repaired. The facial lacerations left scars that were still visible at the time of trial, more than nine months later.

The District Attorney filed an information charging four counts: 1) attempted murder (Pen. Code, §§ 664/187)[1]; 2) aggravated mayhem (§ 205); 3) making criminal

[1]Statutory references are to the Penal Code unless indicated otherwise.

threats (§ 422); and 4) preventing or dissuading a witness from testifying by threats of force or violence (§ 136.1, subd. (c)(1)). The information included special allegations that the attack was committed with a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and caused great bodily injury (§ 12022.7, subd. (a)). After a jury trial, the jury acquitted defendant of all the charged offenses. On count two, however, it convicted him of the lesser-included offense of simple mayhem (§ 203). The weapon allegation was found true. The court sentenced defendant to the upper term of imprisonment of eight years and imposed a one-year enhancement for the use of a deadly weapon.

DISCUSSION

I. Jury instructions

The court gave the jury an instruction on simple mayhem as a lesser-included offense of the charged offense of aggravated mayhem. Defendant argues that the court erred in failing also to give, on its own motion, an instruction on battery with serious bodily injury (§ 243, subd. (d)) as a lesser-included offense of aggravated and simple mayhem. We agree that battery with serious bodily injury was a lesser-included offense of aggravated and simple mayhem, but the evidence did not warrant an instruction on that offense. Consequently, the court did not err.

A trial court must give an instruction, sua sponte, on a lesser-included offense "'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) The court must give the lesser-included offense instruction only if the evidence that the offense was less than charged is substantial enough to merit consideration by the jury. (*Id.* at p. 195, fn. 4.) In other words, if a reasonable finder of fact could conclude both that the evidence supported the lesser offense and that it did *not* support the greater, the instruction on the lesser offense must be given. Instructions must be given on all lesser-included offenses of which this is true. (*People v. Breverman* (1998) 19 Cal.4th 142, 161.)

One offense is a lesser-included offense of another if either of two tests, the statutory elements test and the accusatory pleading test, is satisfied. Under the statutory elements test, an offense is included in the charged offense if all its elements are among those in the statutory definition of the charged offense. Under the accusatory pleading test, an offense is included in the charged offense if the facts actually alleged in the accusatory pleading include all its elements. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) In this case, the information charged aggravated mayhem using the statutory language only; no specific facts other than the names of the defendant and victim and the date of the offense are alleged. As a result, only the statutory elements test applies.

Battery with serious bodily injury is defined in sections 242 and 243, subdivisions (d) and (f)(3):

> "§ 242. Battery defined
>
> "BATTERY DEFINED. A battery is any willful and unlawful use of force or violence upon the person of another.
>
> "§ 243. Battery; punishment [¶] … [¶]
>
> "(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for two, three, or four years. [¶] … [¶]
>
> "(f) As used in this section: [¶] … [¶]
>
> "(4) 'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement."

Aggravated mayhem is defined in section 205:

> "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body.…"

Simple mayhem is defined in section 203:

> "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Simple mayhem is a general-intent crime. Unlike aggravated mayhem, it does not require a specific intent to maim or disfigure. (*People v. Reed* (1984) 157 Cal.App.3d 489, 492; *People v. Wright* (1892) 93 Cal. 564, 566.) For simple mayhem, as well as for aggravated mayhem, the disability or disfigurement must be "permanent." (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1571; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 86, p. 702.) Permanence may be inferred from an injury's long duration. (See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [broken ankle causing disability lasting over six months sufficient to support charge of mayhem], overruled on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, 498.) The possibility of medical alleviation of an injury that would otherwise be permanent does not defeat a mayhem conviction. (*People v. Hill, supra*, 23 Cal.App.4th at pp. 1572-1573.)

It is apparent that all the elements of battery with serious bodily injury are included in the definitions of both mayhem and aggravated mayhem. Anyone who has committed mayhem or aggravated mayhem (a) has necessarily acted with at least a general intent to commit the harmful act, and (b) has necessarily caused at least a serious bodily injury as defined in section 243, subdivision (f)(4). These are all the elements of battery with serious bodily injury. The thrust of the People's argument is there are no cases holding that they are included, but that obviously does not prevent us from applying the established test and drawing a different conclusion.

Here, the evidence did not warrant an instruction on battery with serious bodily injury. First, there is no evidence that the general-intent component of mayhem was absent. The required general intent is shown where "a defendant engages in unlawful

conduct which foreseeably results in his victim's disfigurement." (*People v. Reed, supra,* 157 Cal.App.3d at p. 492.) Plainly, attacking Ironshield with swords foreseeably resulted in the injuries she received. Defendant does not argue otherwise.

Second, the evidence of the victim's facial disfigurement could not be squared with a failure to find the injury element of simple mayhem. A witness testified that she saw the victim in the courthouse cafeteria during the trial, over nine months after the attack. She stated that she was able to recognize the victim by the scars left by her facial injuries and that the scars were quite visible. This testimony was uncontroverted. In light of this evidence, the jury could not reasonably have found that the victim did not suffer permanent disfigurement within the meaning of section 203. (See, e.g., *People v. Keenan* (1991) 227 Cal.App.3d 26, 36, fn. 6 [two scars from cigarette burns remaining three and a half months after attack sufficed to support conclusion that victim suffered permanent disfigurement as contemplated by section 203].)

Defendant contends with some persuasiveness that the jury could reasonably have found that the victim's other injuries were not permanent. There was considerable conflict in the evidence regarding these injuries. For instance, the victim testified that she had not regained the full use of her right hand and left arm, but two witnesses called her credibility into question on this point. They testified that at various times after the date of the attack, they had seen the victim using both hands and both arms without difficulty. A surgeon who participated in the emergency surgery testified that nerve damage in the victim's arm or hand could, but probably would not, fully heal. But it was not clear from his testimony which arm or hand he was referring to, and in any event the jury could credit the testimony of the witnesses who said they saw the victim using both hands and both arms without difficulty. We need not further address these other injuries because the evidence of the victim's facial disfigurement precluded the jury from reasonably failing to find mayhem.

Defendant also argues that an instruction on battery with serious bodily injury should have been given because the victim's facial scars are "not inconsistent with" a finding of battery with serious bodily injury. This is so, he says, because section 243, subdivision (f), includes "serious disfigurement" in the definition of "serious bodily injury." This argument misapplies the test of when a lesser-included-offense instruction must be given. An instruction on the lesser offense is only required when "evidence that the defendant is guilty *only* of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman, supra*, 19 Cal.4th at p. 162, italics added.) Ironshield's disfigurement satisfied the injury element of *both* battery with serious bodily injury *and* mayhem, so the jury could not reasonably find only the lesser-included offense.

The court properly omitted an instruction on the lesser-included offense of battery with great bodily injury.

II. Sentencing

Defendant argues that the court abused its discretion in imposing the upper term of imprisonment because it failed to consider mitigating circumstances adequately and because the mitigating circumstances equaled or outweighed the aggravating ones. The People argue that defendant failed to preserve this issue for appeal and that in any event the court did not abuse its discretion.

We reject the People's contention that the issue was not preserved. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court established the rule that "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" are waived absent contemporaneous objection. This category of claims includes those defendant makes here: that the court failed to "give a sufficient number of valid reasons" and "misweighed the various factors." (*Ibid.*) The court held that if the trial court states the sentence it intends to impose, and the reasons for any

discretionary choices, and then gives counsel an opportunity to object, any objection counsel fails to make at that point is waived. (*Id.* at p. 356.)

Here, the court announced that it had read the probation report and defendant's mitigation statement and that it intended to impose the upper term as recommended. Then it invited argument. Defendant's counsel articulated several purported mitigating factors, including some not discussed in the probation report, and contended that in light of these, the proper weighing of the factors pointed to either the middle or the lower term. The court then stated some specific aggravating factors it relied on, including some not stated in the probation report, and imposed the sentence.

To the extent defendant now argues that the court misweighed the mitigating and aggravating factors, his arguments at the sentencing hearing preserved his objections. The substance of those arguments was that mitigating factors, including those he relies on now, equaled or outweighed the aggravating factors set forth in the probation report so that the middle or lower term should be imposed. To the extent defendant objects to the court's reliance on reasons other than those stated in the probation report, which it failed to mention at the time it invited argument, defendant did not waive his claim because the court failed to provide an adequate opportunity for objection. The court allowed counsel to make arguments and objections regarding its intention to impose sentence based on the probation report. By raising factors not in the report only after counsel made arguments, the court deprived counsel of the opportunity to object to the use of those factors. For these reasons, we proceed to consider the merits.

Where, as here, the statute defining the offense sets forth three possible terms of imprisonment, the Determinate Sentencing Law (§ 1170 et seq.) requires the court to select a term based on its consideration of aggravating and mitigating factors, if any. (§ 1170, subd. (b).) The court may select the upper term if circumstances in aggravation outweigh circumstances in mitigation. It may select the lower term if circumstances in mitigation outweigh circumstances in aggravation. Otherwise, it must select the middle

term. Circumstances in aggravation or mitigation must be established by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420, subds. (a), (b).) The court must make, on the record, "a concise statement of the ultimate facts" on which it bases its decision to impose the upper or lower term. (Cal. Rules of Court, rule 4.420, subd. (e).) The identification and weighing of aggravating and mitigating factors is committed to the court's sound discretion. (See *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250; *People v. Nevill* (1985) 167 Cal.App.3d 198, 203.)

Defendant first argues that the court failed to "give serious consideration" to mitigating factors. We do not agree. The Rules of Court addressing aggravating and mitigating factors in sentencing state that "[r]elevant criteria enumerated in these rules … shall be deemed to have been considered [by the court] unless the record affirmatively reflects otherwise." (Cal. Rules of Court, rule 4.409.) Here the court expressly stated that it had reviewed defendant's mitigation statement and the probation report; then it heard argument on mitigation and aggravation. The court's discussion of its decision to deny probation included references to several proposed mitigating factors. It did not repeat those references while discussing the selection of the upper term a few moments later, but it is unlikely that it no longer had them in mind. The record does not affirmatively reflect that the court failed to consider mitigating factors.

Defendant next argues that the court's weighing of aggravating and mitigating factors was substantively incorrect. The court stated that it relied primarily on two aggravating factors: 1) "the nature and seriousness of the crime and the degree of injury inflicted on the victim"; and 2) the "time for reflection" defendant had after he brandished the sword and the victim grabbed the blade, but before he inflicted further injury on her. Against these, defendant urges several mitigating circumstances: 1) defendant's prior record consisted of only one juvenile adjudication (for cruelty to animals, based on his killing of a stray dog with a sword on his father's instructions); 2) defendant told the probation department he regretted the attack on Ironshield;

3) defendant performed satisfactorily on probation for the juvenile adjudication; 4) the victim was a "willing participant in the incident" because she grabbed the sword and pushed defendant; and 5) "the crime was committed because of an unusual circumstance not [likely] to recur," i.e., presumably, the circumstance of being provoked by the verbal conflict with the victim and defendant's father.

It is indisputable that the injuries defendant inflicted were severe. Defendant argues that severe injuries are inherent in mayhem, but it is not the case that all instances of mayhem are as severe as this one. (See, e.g., *People v. Keenan*, *supra,* 227 Cal.App.3d at pp. 35-36 [two scars from cigarette burns constitute injury serious enough to support mayhem]; *People v. Page* (1980) 104 Cal.App.3d 569, 577-578 [jury could not find that tattoos inflicted against victim's will failed to constitute disfigurement sufficient to support mayhem conviction].) The record also supports the court's conclusion that after the victim grabbed the sword and before her other wounds were inflicted, some time passed, during which defendant could have reflected and decided to stop. Defendant does not dispute this fact. Thus, the court relied on proper factors that are supported by the record. It did not abuse its discretion in concluding that these factors outweighed the mitigating factors advanced by defendant. (See, e.g., *People v. Nevill, supra*, 167 Cal.App.3d at p. 202 ["A single aggravating factor is sufficient to impose an aggravated sentence where the aggravating factor outweighs the cumulative effect of all mitigating factors …."].)

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

_____
Buckley, Acting P.J.

_____
Levy, J.